

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

RUSSELL GAITHER,

Plaintiff,

vs.

NATHAL DEAL, Commissioner; MR.
PHILBIN, Warden; MRS. HARVEY,
Deputy Warden; MRS. DORSEL, Nurse;
MRS. VXZERRO, Nurse; MRS.
BANKS, Nurse; and JOHN DOE, all
nurses unknown at this time, et. al.;

Defendants.

4:21CV3063

MEMORANDUM AND ORDER

This matter is before the court on Plaintiff's Notice of Appeal (filing 11) and Motion for Leave to Proceed in Forma Pauperis ("IFP") on Appeal (filing 12). Plaintiff appeals from the court's April 22, 2021 Memorandum and Order (filing 8) and Judgment (filing 9) which dismissed this action without prejudice pursuant to the three-strikes rule in 28 U.S.C. § 1915(g).

As stated in the Prison Litigation Reform Act ("PLRA"), a prisoner cannot

bring a civil action or appeal a judgment in a civil action or proceeding [IFP] if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. §1915(g).

The court took judicial notice that the United States District Court for the Southern District of Georgia has previously determined that three or more federal court cases brought by Plaintiff, while a prisoner, were dismissed as frivolous or for failure to state a claim. *See, e.g., Gaither v. Georgia*, No. 6:19-CV-49, 2020 WL 261236 (S.D. Ga. Jan. 16, 2020), *report and recommendation adopted*, No. 6:19-CV-49, 2020 WL 762854 (S.D. Ga. Feb. 14, 2020) (identifying at least three civil actions that were dismissed and constitute strikes under § 1915(g) and listing four additional cases where Plaintiff was identified as a “three-striker”); *Gaither v. Epps*, No. 1:16-CV-103, 2016 WL 4445264 (S.D. Ga. Aug. 19, 2016), *report and recommendation adopted*, No. 1:16-CV-103, 2016 WL 6272384 (S.D. Ga. Oct. 25, 2016) (identifying strikes and dismissing based on three strikes rule).

As the court previously stated, Plaintiff has failed to show that any of the cases referenced above were actually not dismissed as frivolous or for failure to state a claim, nor has he shown that the case he seeks to file in this court is one in which Plaintiff is “under imminent danger of serious physical injury.”¹ 28 U.S.C. § 1915(g). Thus, Plaintiff is not entitled to proceed IFP on appeal.

IT IS THEREFORE ORDERED that: Plaintiff’s Motion for Leave to Proceed in Forma Pauperis on Appeal (filing 12) is denied.

Dated this 8th day of June, 2021.

BY THE COURT:



Richard G. Kopf
Senior United States District Judge

¹ The court notes that it carefully examined Plaintiff’s twenty-six-page Notice of Appeal (filing 11) and did not find any basis upon which to apply the danger-of-serious-physical-injury exception under 28 U.S.C. § 1915(g).